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No. 99-1763

Supreme Court, U.S.
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In The
Supreme Court of the United States

GULF INSURANCE COMPANY,

Petitioner,

v.

SIEGFRIED CONSTRUCTION, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

Does a performance bond's condition precedent that the principal be in default and that the obligee declare the principal to be in default require termination of the principal to invoke a surety's obligations under that performance bond?

TABLE OF CONTENTS

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE SIMPLY REWRITING THE PERFORMANCE BOND DOES NOT ELIMINATE THE ISSUE 1

CONCLUSION 2

TABLE OF AUTHORITIES

See Standard Form 25, 48 C.F.R. 53.228(b) 1

Petitioner, Gulf Insurance Company, again respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

REASONS FOR GRANTING THE WRIT
THE PETITION SHOULD BE GRANTED BECAUSE SIMPLY REWRITING THE PERFORMANCE BOND DOES NOT ELIMINATE THE ISSUE

Rewriting the language of this performance bond would not eliminate use of performance bonds containing the language at issue in this case or similar language. This particular performance bond is based on Form A311 promoted by the American Institute of Architects, not the surety industry, and continues to be used by the construction industry. The construction industry, not the surety industry, often dictates the performance bond form to be used on a project. In fact, performance bonds exist that do not use the language "declare to be in default." See Standard Form 25, 48 C.F.R. 53.228(b). Siegfried Construction, Inc. (hereinafter "Siegfried"), however, accepted this performance bond and the requirement that it must "declare in default" the principal before Gulf Insurance Company (hereinafter "Gulf") would be obligated under the bond. Siegfried could have required that Jennifer Builders, Inc. (hereinafter "Jennifer Builders") use another performance bond form that did not require that Siegfried terminate the principal before Gulf would be obligated. Siegfried, however, did not require any other such form.

Simply rewriting its performance bonds also does not end the debate as to whether breach should be equated with default as held by the Fourth Circuit Court of Appeals or whether default requires termination as held by the Fifth Circuit Court of Appeals. This issue arises in other contexts, and the Fourth Circuit Court of Appeals and the Fifth Circuit Court of Appeals have reached different conclusions based

on the "unambiguous" language of a performance bond which requires a "declaration of default." Such a split in the circuits requires review by this Court.

Thus, Gulf's Petition should be granted so that the Court may resolve an important issue to the construction industry and the surety industry.

CONCLUSION

Resolution of the issue raised in this case is important to the surety industry and the construction industry and does merit review by this Court. Accordingly, Gulf Insurance Company again respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,
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